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सं. 17]

नई दिल्ली, जुलाई 2—जुलाई 8, 2017, शनिवार/आषाढ 11 — आषाढ 17, 1939

No. 17]

NEW DELHI, JULY 2—JULY 8, 2017, SATURDAY/ASADHA 11—ASADHA 17, 1939

इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह पृथक संकलन के रूप में रखा जा सके

Separate Paging is given to this Part in order that it may be filed as a separate compilation

भाग II—खण्ड 3—उप-खण्ड (iii)

PART II—Section 3—Sub-section (iii)

केन्द्रीय अधिकारियों (संघ राज्य क्षेत्र प्रशासनों को छोड़कर) द्वारा जारी किए गए साधारण आदेश और अधिसूचनाएं

Orders and Notifications issued by the Central Authorities (Other than the Administrations of Union Territories)

भारत निर्वाचन आयोग

नई दिल्ली, 12 जून, 2017

आ.अ. 28.—लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106(क) के अनुसरण में, निर्वाचन आयोग एतद्वारा निर्वाचन अर्जी सं. 2/2014 में दिये गये उच्च न्यायालय, पटना के तारीख 23 मार्च, 2017 के आदेश को प्रकाशित करता है।

(आदेश अधिसूचना के अंग्रेजी भाग में छपा है।)

[सं. 82/BR-HP/ES-1/EP/(2/2014)/2017]

आदेश से,

सुमित मुखर्जी, सचिव

ELECTION COMMISSION OF INDIA

New Delhi, the 12th June, 2017

O. N. 28.—In pursuance of Section 106(a) of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby published Order dated the 23rd March, 2017 of the High Court of Judicature at Patna in Election Petition No. 2 of 2014.

IN THE HIGH COURT OF JUDICATURE AT PATNA**Election Petition No. 2 of 2014**

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Satya Nand Sharma son of Ram Sagar Sharma resident of Mohalla Shivpuri, Navchetna Path, P.S. Gardanibagh, P.O. Anishabad, Dist. Patna.

... Petitioner/s

Versus

1. Kaushlendra Kumar son of Kameshwar Garai village Haiderchak, P.O. Khorampur, P.S. Islampur Dist. Nalanda.
2. Ashis Ranjan Singha son of Bindeshwari Prasad resident of A/34, Gandhi Bihar Anishabad police colony, P.S. Gardanibagh, P.O. Anishabad, Dist. Patna.
3. Sanjay Kumar son of Shohrai Rabidash resident of village Pesaur, P.O. and P.S. Rahui Dist. Nalanda
4. Dharendra Kumar son of Sachchitanand Singh resident of village and P.O. Suhabanpur Sudhi P.S. Islampur, Dist. Nalanda.
5. Nayab Ali son of Hasan Ali resident of Mohalla Kaggi P.O. and P.S. Biharsharif, Dist. Nalanda.
6. Niraj Sharma son of Rajendra Sharma resident of village Kapsiyaba, P.O. Kapsiyaba P.S. Hilsa, Dist. Nalanda.
7. Parnav Prakash son of Suresh Chandra resident of Mohalla G-82, P.C. Colony Kankarbagh P.O. and P.S. Kankarbagh, Dist Patna-20
8. Pramod Kumar Nirala son of Chandeshwar Singh resident of village Takabigha, P.O. Lakhanpura P.S. Bakhtiyarpur, Dist. Patna.
9. Bhola Shaw son of Raghu Sao resident of village Bikrampur P.O. and P.S. Ekangarsarai, Dist. Nalanda.
10. Mahesh Paswan son of Suraj Paswan resident of village Nekpur, P.O. Nekpur, P.S. Chhabilapur, Dist. Patna.
11. Yogendra Prasad son of Krishna Prasad resident of village Rasalpur, P.O. Jagai P.S. Aungahi, Dist. Nalanda.
12. Rakesh Ranjan Singha son of Anil Kumar Singha resident of village Kudwapur, P.O. and P.S. Ekangarsarai, Dist. Nalanda
13. Lallu Ram son of Bindeshwar Ram resident of village Milkipar, P.O. Bali Belchi P.S. Chandi, Dist. Nalanda.
14. Shashi Yadav wife of Dharendra Yadav resident of Mohalla Water Tower, Road No. 2 P.O. G.P.O. P.S. Kotwali dist. Patna.

15. Shailesh Kumar son of Bhatu Kebat resident of Mohalla Bari Pahari town Bihar Sharif, P.O. Sohsarai, P.S. Sohsarai, Dist. Nalanda.
16. Awadh kumar son of Jamun Prasad resident of village and P.O. Diyawa, P.S. Karai Parsurai, Dist. Nalanda.
17. Naresh Prasad Singh son of Sidheshwar Prasad resident of Mohalla Naisharai Ward No. 11 P.O. and P.S. Bihar Sharif, Dist. Nalanda
18. Kaushal Kumar @ Kaushlendra Singh @ Bharat Manas son of Bindeshwar Prasad Singh resident of village Jaishiv Bigha, P.O. Habipur, P.S. Parwalpur, Dist. Nalanda.
19. Munna Prasad son of Ram Lakhan Prasad resident of village Chorbigha, P.O. Jagdishpur, Tiaryi, P.S. and District Nalanda
20. Lata Singha W/o Pramod Kumar resident of village Sundibigha P.O. and P.S. Ekangersarai, Dist. Nalanda.
21. Vishwajeet Kumar Son of Kunali Prasad resident of village Rashalpur, P.O. Karai, Parsurai, P.S. Karai, Parsurai, Dist. Nalanda.

...Respondent/s

Appearance :

For the Petitioner : Mr. S. N. P. Sharma Sr. Advocate Mr. Amrendra Kumar Singh, Advocate

For the Respondent No. 1 : Mr. Awadhesh Prasad Sinha, Advocate

For rest of the respondents : Mr. S.K. Verma, Advocate.

**CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL CAV
JUDGMENT**

Date: 23-03-2017

The present election petition filed under Sections 80, 80-A and 81 of the Representation of People Act, 1951 (for short „the Act’) has been filed by Shri Satya Nand Sharma challenging the election of the respondent No.1 Shri Kaushlendra Kumar (hereinafter referred “as the Returned Candidate”) as a Member of the Parliament (Lok Sabha) from 29 Nalanda Parliamentary Constituency for which election was held in 2014.

(2) The election petitioner contested the said election on being nominated by the Lok Jansakti Party (LJP) whereas the Returned Candidate was nominated by the political party Janta Dal United. The last date of filing nomination papers was 26.03.2014. The election petitioner, the returned candidate and other respondents were validly nominated to contest the said election. They all contested the said election for which the polls had taken place on 17.04.2014. The counting of votes was undertaken on 16.05.2014 and the result thereof was published on the same day. The Returned Candidate having secured 321982 valid votes was declared elected. The election petitioner was the first runner up having polled 312355 valid votes. The election symbol of the election petitioner was ‘Bungla/Jhopari’ whereas the JDU had contested the said election on the election symbol of ‘Arrow’. It may be noted that respondent No.2 had contested the said election as the official candidate of Indian National Congress who had secured 127270 valid votes. The difference between valid votes polled by the respondent No.1 and the election petitioner was 9627. The above winning margin being slender which gave cause to the election petitioner to file the present election petition mainly on two counts as would seen from paragraph Nos. 12,15 and paragraph Nos. 13,14,16 and 17. The grounds of challenge can be bifurcated into two parts. Paragraph Nos. 12 and 15 of the election petition allege that during the said election the Returned Candidate involved

himself in corrupt practices as several voters/supporters of the election petitioner at booth No. 128, located in Middle School, Kosut of 176 Nalanda assembly Constituency (one of the assembly segments falling in 29th Nalanda Parliamentary Constituency) were scared away forcibly from the booths in presence of the Returned Candidate himself by his supporters. Similarly, it is alleged that in altogether 32 booths falling in 177 Harnaut Assembly Constituency the voters/workers of the JDU candidate and local MLA procured illegal votes in favour of the JDU candidate. Second allegation as seen from paragraph Nos. 13,14,16 and 17 of the election petition is that during the counting of votes several irregularities and illegalities were committed to favour the Returned Candidate.

(3) On notice, written statement was filed by the Returned Candidate. The other respondents also filed written statements in two sets. Upon written statement(s) being filed, the Court with the agreement of both the sides, vide order dated 22.09.2014, framed the following issues:—

1. *“1. Whether the election petition is fit to be dismissed summarily under section 86(1) of the Representation of Peoples’ Act, 1951 for non compliance of the mandatory provision of sections 81, 82 and 117 of the said Act read with section 100 of the Act?*
2. *Whether the election petition is fit to be dismissed summarily under Order VII, Rule 11 of the Code of Civil Procedure?*
3. *Whether respondent No. 1 has committed corrupt practice of undue influence upon the voters as alleged in the election petition and if so, whether the respondent No. 1 is guilty of commission of corrupt practice of undue influence as alleged in the election petition rendering the election of respondent No. 1 as void?*
4. *Whether the irregularities and illegalities were committed in the course of counting of votes as allege in the election petition. If so, is the election petitioner entitled to be declared elected after deducting 50,000 void votes counted in favour of respondent No. 1?*
5. *Whether the election petitioner is entitled to get any other relief/reliefs.”*

(4) The respondent No. 1 on issue Nos. (1) and (2) filed separate Interlocutory Applications (I.A. No. 8422 of 2014 and I.A. No. 8423 of 2014) which was contested by the election petitioner. Under order dated 21.01.2015, the Court, while rejecting those Interlocutory Applications, answered those issues in favour of the election petitioner. The remaining two issues, namely, (3) and (4) relate to the allegation of commission of corrupt practices and the allegation of commission of irregularities and illegalities in the counting of votes. The related issue is whether upon answering issue No.4 in favour of the election petitioner, is he entitled to further relief of declaring him duly elected at the said election.

(5) In order to prove the allegations, the election petitioner adduced oral as well as documentary evidence. As many as 13 witnesses were examined on behalf of the election petitioner, namely, Satya Nand Sharma (election petitioner) PW-1, Dharam Bichar Paswan (PW-2), Sonu Kumar (PW-3), Dilip Paswan (PW-4), Balmiki Paswan (PW-5), Niraj Sharma (PW6), Rajendra Kumar (PW7), Yogendra Prasad (PW8), Lallu Ram (PW9), Munna Prasad (PW10), Dhirendra Kumar (PW11), Shailesh Kumar (PW12) and Devendra Sharma (PW13).

The Returned Candidate examined 07 witnesses, namely, Shri Shiv Kumar Yadav @ Sardar Jee (RW-1), Ranjeet Paswan (RW-2), Smt. Munni Devi (RW3), Ravindra Kumar (Official)(RW-4), Md. Parwez Akhtar (Official) (RW-5), Ram Bali Paswan (Official/Presiding Officer) (RW-6) and Kaushlendra Kumar (RW-7)

(6) First, I would deal with the issue No. (3) which pertains to allegations of having indulged in corrupt practices at the said polls by the Returned Candidate. The relevant pleadings made in this regard by the election petitioner have already been noticed. The main allegation is that 07 voters of the election petitioner who had stood up in the queue to cast their votes at booth No. 128, located in

Middle School Kosut of 176 Nalanda Assembly Constituency, were scared away forcibly from the booth in presence of the Returned Candidate himself. They were, thus, not permitted to cast their votes. In paragraph No. 15 of the election petition, it is alleged that at booth Nos. 14, 15 and 22 falling in 177 Harnaut Assembly Constituency, the workers and supporters of JDU and the MLA illegally procured votes in favour of the Returned Candidate. In essence, the allegation is of capturing those booths by the JDU candidate (Returned Candidate).

7) Before the Court delves into the issue and appraise the evidence/material brought on record by the rival parties, it is apt to notice the relevant provisions of the Act which has relevance in the case. Section 123(2) of the Act defines the corrupt practice.

“123. (2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person [with the consent of the candidate or his election agent], with the free exercise of any electoral right: Provided that—

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein who—

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure, shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;.....”

[(8) booth capturing by a candidate or his agent or other person.] Explanation.—(1) In this section, the expression "agent" includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate.

(2) For the purposes of clause (7), a person shall be deemed to assist in the furtherance of the prospects of a candidate's election if he acts as an election agent of that candidate.]

[(3) For the purposes of clause (7), notwithstanding anything contained in any other law, the publication in the Official Gazette of the appointment, resignation, termination of service, dismissal or removal from service of a person in the service of the Central Government (including a person serving in connection with the administration of a Union Territory) or of a State Government shall be conclusive proof—

(i) of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, and

(ii) where the date of taking effect of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, is stated in such publication, also of the fact that such person was appointed with effect from the said date, or in the case of resignation, termination of service, dismissal or removal from service, such person ceased to be in such service with effect from the said date.]

[(4) For the purposes of clause (8), "booth capturing" shall have the same meaning as in section 135A.....”

(8) PWs-2, 3, 4, 5 and 7 are the witnesses who amongst the 07 named in the election petition were allegedly scared away or forbidden by the supporters/workers of the Returned Candidate in his presence. Along with the election petition, the complaints filed by the election agent of the election petitioner before the Returning Officer or the Election Commission of India have been enclosed. They have been marked as Exhibits 6,7,8 and 9. There is some objection of the Returned Candidate

to their admitting in evidence which shall be dealt with at appropriate stage. Affidavited examinations- in- chief on behalf of those witnesses have been filed. They were, however, subjected to cross-examination by the Returned Candidate. All the aforesaid witnesses have stated almost identically as per their examinations-in-chief. On the date of poll they were at the polling Station located in the Middle School Kosut and were standing in the queue to vote when the supporters of the Returned Candidate in his presence forced them to leave the polling booth without casting vote. The Exhibits, referred to above, are the complaints/letters written to the Returning Officer or the Election Commission of India (for short 'The ECI') by the Election Agent (PW-13) of the election petitioner with regard to the said incident. To counter the said allegation the Returned Candidate adduced oral evidence of RW-1 Shiv Kumar Yadav, RW-2 Ranjeet Paswan, RW-3 Munni Devi and 03 official witnesses, namely, RW-4 Ravindra Kumar, RW-5 Md. Parweej Akhtar, and RW-6 Ram Bali Paswan who was the Presiding Officer on booth No. 128, Primary School, Kosut. The Returned Candidate examined himself as RW-7 and denied the allegations. In his evidence, he has stated that on the relevant day he had not visited the polling booth in-question. He remained throughout at his house in his village.

(9) In order to consider the point at issue, I would first scan the relevant pleadings and the oral evidence adduced by the parties. In paragraph No. 12 of the election petition, it is stated that on the day of poll, the Returned candidate himself came to booth No. 128, located in Middle School Kosut and said that voter standing in queue to cast their votes in favour of the election petitioner and scared away forcibly from the booth in his presence. The election petitioner has named Balmiki Paswan, Dilip Paswan, Sonu Kumar, Dharam Bichar Paswan, Upendra Paswan, Santosh Kumar and Rajendra Kumar as voters who had queued up at the polling booth but were scared away by the respondent No. 1 himself and his workers/supporters. In paragraph No. 15, it is stated that the booths, in all 32, falling in 177 Harnaut Assembly Constituency were captured by the workers and MLA of JDU and illegal votes were procured in favour of the Returned Candidate.

(10) In order to substantiate the aforesaid, the election petitioner adduced oral evidence of himself (PW-1), Sri Dharam Bichar Paswan (PW-2), Sonu Kumar (PW-3), Dilip Paswan (PW-4), Balmiki Paswan (PW-5), Rajendra Kumar (PW-7) and Devendra Sharma (PW-13) the election agent of the election petitioner. In their respective examinations-in-chief they all have stated that on the day of poll the Returned Candidate himself visited the booth No. 128 and directed/ordered to scare away forcibly the voters standing in the queue and thereby they were forcibly prevented from casting their votes. Almost every witness has named those 07 persons as the voters who were driven away from the booth at the behest of the Returned candidate who was present at the booth. However, in cross-examination the election petitioner (PW-1) has admitted that his evidence on the point is only hearsay. He further admitted at the said booth he had polled the highest number of votes whereas the Returned candidate polled only 41 votes.

PW-2, in his examination-in-chief, has deposed in the similar vein. During his cross-examination, he has shown his inability to state about the total number of votes to be polled at Kosut Primary School. About 12 to 15 persons were standing in the queue when some persons came and chased them. He again named those voters who were scared away. Shri Kaushlendra Kumar (Returned Candidate) was amongst the persons who had ordered and scared away persons. He could not approach the police out of fear. He has, however, further admitted that he fled away from outside the booth as he was not allowed to go inside the booth. He only informed the election agent (PW-13). The evidence of PW-3 Sonu Kumar is also to the same effect. In his cross-examination, he too has stated that 10-15 persons went together for the purpose of casting votes. He could not remember the names of those persons except the seven who have been named by the election petitioner in the election petition. As they were standing in the queue, they were obstructed from casting the votes. He along with others were driven away from the queue. Thereafter this witness sat near a peepal tree 100 ft. away from the booth. About the occurrence he did not disclose to anybody except the party workers. Surprisingly, he too does not know the name of the polling agent of the party who was present at the booth.

PW-4, in his examination-in-chief, has stated about scaring away of himself and 06 other voters when they were standing in queue to cast vote at booth No. 128. The respondent No.1 along with his supporters/workers came at the said booth and respondent No.1 himself along with his workers scared away the voters. In his cross-examination, he states that nobody was assaulted but only driven away and thereafter those voters assembled under the peepal tree. He did not inform the police officer or nobody regarding this incident. This was out of fear.

Balmiki Paswan (PW5) has similarly in his examination-in-chief stated about scaring away the voters including himself by the Returned candidate and his supporters. He too says that police was not informed out of fear. Only the election agent (PW-13) was informed regarding the incidence. To the same effect Rajendra Kumar (PW-7) has deposed.

(11) In order to rebut the allegation, the Returned Candidate adduced oral evidence of RW-1 Shiv Kumar Yadav @ Sardar jee, RW-2 Ranjeet Paswan and RW-3 Munni Devi. In order to demonstrate that the voting at the said booth was peaceful and there was adequate security arrangement provided by the administration the evidence of official witness RW-5 Md. Parweej Akhtar who was Sector-cum-Zonal Magistrate at Kosut and RW-6 Ram Bali Paswan, the Presiding Officer of booth No. 128, Primary School Kosut have been examined.

RW-1 has stated in his examination-in-chief that he had gone to booth early in the morning to cast his vote and remained around the polling booth till 5 pm. He could notice Sonu Paswan, Dilip Paswan, Balmiki Paswan, Ram Bichar Paswan and Dharam Bichar Paswan and few others standing ahead of him in the queue. There was no obstruction by anyone in casting their votes. On the day of poll the Returned candidate had not visited the polling booth nor his any supporter. From his cross-examination, it is apparent that he was the voter in whose presence EVM machines used at the booth were sealed. After casting votes, he stayed near the polling booth to help the polling agent of the Congress party. The patrolling party consisting of six police personnel(s) visited the booth in the morning. 03 officers/ personnel(s) of the Government were present inside the polling booth. He could see the Magistrate on duty in civil dress sitting with the patrolling party. He has, however, admitted that he is Vice President of Congress party in Nalanda District.

RW-2 Ranjeet Paswan has similarly, in his examination-in-chief, has stated that he is the registered voters at the said booth and he had actually cast his vote on the relevant date. While casting vote nobody had disturbed any voter who had queued up for casting vote. On the date of polling the Returned Candidate had not visited the said polling booth. In his cross-examination, he has stated that his wife was desirous to contest the election from Rajgir reserve Assembly Constituency as a JDU candidate. While he was at the booth, 25-30 voters were standing ahead of him. It took him nearly 1 and ½ hours to cast his vote. He has, however, denied that the Returned candidate or his supporters had ever come to the booth on the date of poll and scared the voters from the polling booth. Armed police personnel(s) were stationed at the polling booth and patrolling party also used to visit the booths at intervals. He has emphatically denied that any obstruction was ever put to the voters in casting their votes. He himself is not a political worker. RW-3 Munni Devi has similarly stated in his examination-in-chief that she is a voter of the said booth and had cast her vote. There was no disturbance at the polling booth. No voter was obstructed by anyone. In her cross-examination, she has admitted that she is a member of the Zila Parishad, Nalanda. She wanted to contest the election as official candidate of JDU. She has denied the suggestion that owing to her political allegiance she had come to depose in the case. She reached the polling booth at about 11-12 A.M; stood up in the queue and waited for about 45 minutes before she could enter the polling booth and cast her vote. After casting her vote she went to the nearby village to persuade the female voters to cast their votes.

RW-5 (official) on the relevant date discharged the duty of Sector-cum-Zonal Magistrate. He was in-charge of 22 polling booths including booth No. 128 at Primary

School, Kosut. At least on 3 or 4 occasions he had visited the said booth. No any incidence of the obstruction of the voter was found in his presence. He had also not received any complaint of this nature on this booth. In his cross-examination, he has stated that in course of visit of the polling booth he used to stay 5 to 10 minutes at the booth.

RW-6 (official) was on the date of poll discharging the duties of the Presiding Officer at booth No. 128. He has stated on the date of poll, there was no any 'hungama'. No voter was obstructed by anyone from casting vote. The Returned Candidate had not visited the polling booth on the said date of poll. In cross-examination, he has stated that his substantive post is Incharge Headmaster of Gorawan (Silao Block), Kosut booth, about 12 to 13 kms from the school. He was inside the room whereas other officers assisting in poll were sitting on the 'verandah'. The polling was smooth and peaceful at the booth. He has denied the suggestion that he too contributed in capturing the booth for the Returned Candidate. He has also denied the suggestion that dishonestly he recorded in the Presiding Officer diary that the polling at the booth was peaceful. To a question, the witness produced a paper and stated that this will show his appointment as the Presiding Officer at the said polling station.

Shri Kaushlendra Kumar, the Returned Candidate also took the dock and deposed as RW-7. He has stated that on the date of poll he had not visited any village like Kosut or any other village in Harnaut Assembly Constituency. On the basis of his information he has stated that none of his workers/supporters had gone to the polling booth in Kosut on the date of poll. He had no personal information that any voters at Kosut polling booth was prevented from casting vote. He had secured meager number of votes at the Kosut polling station. It was the polling booth surrounded by the supporters of Sri Satya Nand Sharma, the election petitioner. In his cross-examination, he has stated that he had appointed polling agents on all booths including Kosut. He admits that where he was stationed on the date of poll was not stated by him in his written statement.

Once the oral evidence adduced on behalf of the rival parties are scanned it becomes explicit that there is allegation of scaring away the voters, few of them are named in the election petition by the Returned Candidate and/or his supporters/workers whereas there is complete denial of the said allegation through the oral evidence adduced by the Returned Candidate.

(12) It has been submitted on behalf of the election petitioner on the basis of the Exts.6 to 9 that promptly the matter was reported to the Returning Officer as well as the ECI. There is, thus, contemporaneous documents to show that scaring away of the voters by the Returned Candidate and his supporters at the said polling booth was promptly reported. The Returning Officer of the election has not been examined. The Returned Candidate has, however, examined RW-4(official), namely, Mr. Ravindra Kumar who was then posted as the Deputy Election Officer, Bihar Sharif and was associated with the general election held in 2014 from the said Parliamentary Constituency. He has stated that a complaint cell was constituted during the election. Apart from the complaint lodged before the Returning Officer as well as before him or the election control room. Looking to the complaints lodged by the election agent of the election petitioner (Exts. 6 to 9) which have also been annexed with the election petition supported by affidavit, it is stated that none of the aforesaid communication appended to the election petition were transmitted to and received in his office. To a Court query, he has stated that he was stating so on the basis of the documents available in his office. Any complaint received in course of poll was enquired into and result thereof communicated to the Chief Electoral Officer, Bihar.

It is further found from the record that Annexure-1 to 4 of the election petition, on the request of the election petitioner, were called for from the custodian(s) thereof but they were not sent to and received, the explanation being that they were not filed and available on record. In this context, the election petitioner filed I.A. No. 8114 of 2015 for accepting those

Annexure(s) as secondary evidence. Considering the fact that those Annexure(s) were supported by the affidavit and filed along with the election petition for which foundation was laid in the election petition the same was allowed and they were marked as Exhibits 6 to 9 as those Annexure(s) were the integral part of the pleading which can always referred and relied upon by the election petitioner whether marked Exhibits or not. The Court would only highlight here that those documents were not furnished by the election authority on the ground that they were not filed, and processed.

(13) Seen thus, is found that oral evidence on this point has been adduced by both the parties. It has been submitted on behalf of the election petitioner that obstruction to the voters in exercising his franchise is a glaring example of corrupt practice adopted at the election covered by Section 123 (2) and (3) of the Act. If any voter is obstructed in casting vote at the behest of the Returned Candidate or his supporter in his presence is proved to the hilt, the election of the Returned candidate shall stand vitiated. Reliance in this regard is placed on the case of *Janak Sinha v. Mahant Ram Kishore Das* reported in AIR 1972 SC 359 wherein the Apex Court, on a consideration of the attending facts and circumstances appearing in the case, held that when a voter is prevented from exercising his votes by the supporters of the appellant and in his presence and without any attempt made by latter to stop his supporters from so doing, the only inference was that PW-44 was prevented from voting by the supporters of the appellant with the latter's consent. If that is so, it follows that there has been a direct interference with the free exercise by the said witness of his electoral right and the Returned Candidate (appellant) was guilty of corrupt practice of undue influence under Section 123(2) of the Act. The aforesaid proposition of law was enunciated considering the fact that it was an admitted position that on the booth number 57, the polling was very seriously disturbed and the polling was postponed to some other date. The evidence was also led by the respondent that he was assaulted by the appellant and his polling agent at the said booth on the deferred date of poll. He was pushed out of the polling booth by the appellant himself and his election agent and supporter and that he sustained injuries regarding which complaints had been made to the police. Another incident had taken place on the same day at 12 noon when the polling agent of the respondent was prevented from discharging his duties and turned out from the polling booth by the appellant. The learned trial Judge, on appreciation of evidence, had found that corrupt practice of undue influence was committed at the said booth on the date of poll and the respondent was also assaulted. Turning to the evidence led in by the parties in the present case, it is found that the disturbance at the said booth on the date of poll by the Returned Candidate or his supporters was not reported to any election authority or the police personnel supervising the poll at the said booth. The respondents have led evidence to the effect that there was adequate number of police personnel(s) deployed at the polling booth and the patrolling party consisting of Magistrate and police personnel visited the booth intermittently. The witnesses of the election petitioner claimed to have remained present near the polling booth sitting under the Peepal tree for a quite long time but no such complaint or information was given to the police personnel or the Magistrate stationed /visiting the polling booth. On the other hand, they have stated that they did not disclose to anyone about what happened with them save and except informing the election agent of the election petitioner about the incident. In *Ram Saran Yadav vs. Thakur Muneshwar Nath Singh & Ors.* AIR 1985 SC 24, on which reliance has been placed by the election petitioner, the Supreme Court found the plea of alibi of the Returned Candidate unnatural and not satisfactory. The Apex Court also noticed that the Returned Candidate had not stated in his written statement that he had not gone to the polling booth in question. The explanation given by the Returned Candidate was lame explanation which was held as an afterthought. It was found to be the one taken for the first time in Court when he came in the witness box. It has, thus, been argued with much emphasis that the present case is squarely covered by the enunciation of law made on this point by the Hon'ble

Apex Court. In the present case, it is found that in para-6 of the written statement of the Returned Candidate while denying the allegation of having indulged in corrupt practice by him, it has been stated that respondent No.1 (Returned Candidate) had never went on the date of poll to booth No. 128. None of the electorates were scared either by the respondent no.1 or his supporters at the said booth in his presence. It is, thus, not a case where the plea of this nature while denying the allegation made by the election petitioner was taken by the respondent quite abruptly only while deposing in the Court bereft of the pleading made in this regard. It has been submitted by the election petitioner that the evidence of the Returned Candidate (RW7) on this aspect is completely evasive as the Returned Candidate in his deposition has not disclosed about the place where he was on the date of poll. He has only stated that he remained at his village on the date of poll and did not visit the Kosut polling station. The alibi taken by him, therefore, does not inspire confidence. It is an afterthought. The witness ought to have disclosed the place where he was present on the date of poll. There is no dispute at the Bar that allegation of using corrupt practice during the poll is akin to the criminal charge. The first legal duty is on the allegator (election petitioner) to prove by cogent evidence that actually the voters were scared away from the polling booth by the Returned Candidate or his supporters in his Patna High Court E.P. No.2 of 2014 dt. 23-03-2017 21/27 presence whereafter the onus would shift on the Returned Candidate. The Court is, therefore, obliged to examine whether the burden of proof has been adequately discharged by the election petitioner. As noticed, oral evidence and counter oral evidence has been led on this point by both the parties. It is also apparent that no complaint of such scaring away of those witnesses was lodged with the police personnel(s) or the patrolling party who had visited on few occasions the polling booth or stationed thereat. The witnesses of the election petitioner remained near the polling booth for a quite long time. Except informing the election agent of the election petitioner they did nothing. The Magistrate overseeing the smooth poll or the armed police personnel stationed at the booth were not informed. It is also not a case of physical assault on any supporters/voters of the election petitioner which was promptly reported to the police or armed police personnel(s) stationed at the booth. It has been argued with reference to the Annexures 1 to 4 appended to the election petition (marked as Exts. 6 to 9) that there are contemporaneous documents to show that the incident was promptly reported to the Returning Officer as well as the E.C.I. I have already noticed that those documents were not made available to the Court with an explanation that they were never filed and are available on the record. Turning to the evidence of RW-4 (Deputy Election Officer), it is found that any such complaint filed was processed and the result thereof made available to the ECI. Thus, complaints in course of polling were supposed to receive in the office of this witness which, however, were not received, processed and result thereof communicated to the ECI. The allegation of having indulged in corrupt practice being akin to a criminal charge was required to be demonstrated convincingly whereafter the burden would shift on the Returned candidate. RW-6 was the Presiding Officer at the said booth on the date of poll. He is required in law to maintain a diary. If any illegality/irregularity or mis-happening occurs during the polls he is obliged to enter the same in his diary. This witness has clearly stated that as no such incident had occurred, he had not entered the same in the Presiding Officer's diary.

It has been argued on behalf of the election petitioner and adopted by the other respondents supporting the election petition that the oral evidence of RW-7, the Returned Candidate on the plea of alibi is evasive and incomplete as he has not stated about the place(s) where he had stayed on the date of poll in his written statement. I have already noticed the relevant pleadings made on behalf of the Returned Candidate in the written statement. In no uncertain term, it was stated by him (Returned Candidate) that on the date of poll he had not personally visited polling booth at village Kosut. It was, thus, his complete denial of the allegation of having exercised undue influence on the voters at the said booth by preventing one or many voters from casting his/their vote by him or his

supporters/workers. It is easy to allege that the Returned Candidate himself or in his presence his supporters got the voters scared away from the queue but difficult to prove the same. Perhaps, the slender margin by which the Returned Candidate was declared elected punctuated the election petitioner to allege so which has not been proved by convincing materials placed on record. If the foundation is laid in the pleading the witness can always supplement the same in course of deposition. Law in this regard is eloquently settled. Even without delving into the much debated point whether Exts. 6 to 9 would constitute the secondary evidence duly proved and brought on record it is found that the Kosut polling booth was surrounded by the supporters of the election petitioner. Obviously, as per the evidence, the election petitioner polled the highest number of votes at the said booth whereas the Returned candidate polled only 41 votes. The election petitioner has himself admitted the said position. The Court even after considering the same does not find, in view of other relevant materials on record, that the charge of the Returned Candidate having himself indulged in the corrupt practices of exercising undue influence on the voters in the manner alleged by the election petitioner has not been proved to the hilt. The point at issue is decided against the election petitioner.

With regard to the corrupt practice having been committed by the Returned Candidate in procuring illegal votes as alleged in para 15 of the election petition, it is found that a general allegation has been levelled that the workers of JDU and local MLA captured the booths. However, the election petitioner has not disclosed the names of any of the workers or even the MLA who did so and in what manner. None of the villagers or the voters of those booths have come forward to support the allegation of booth capturing except the election petitioner.

(14) The next point at issue relates to the illegalities and irregularities in the counting of votes. Relevant pleadings in this regard have been made in paragraph nos. 13,14,16 and 17 of the election petition. The Returned Candidate, in paragraph no. 16,17,18, 19, 20, 21 and 22 of his written statement has denied those allegations. No oral evidence has, however, been adduced on this point by the election petitioner. In support of the said allegation, the election petitioner has cited examples of 02 booths, namely, 208, Panchayat Bhawan, Tribhuwan Bigha and 69 Primary School Pendapur where polling percentage was 100% but the counting result indicates that not a single vote was polled. This has been cited as a glaring example of illegal counting of votes in favour of the Returned Candidate. PWs 7,8,9 and 10 have deposed in support of the said charge. Ext. A has been brought on record by the respondent (Returned Candidate) which is the „Voter Turn Out Report’. Total number of votes at the said booth has been shown as 485. The Final Result Sheet’ (Ext. B) displays the Voter Turn Out as ‘0’. The respondent has relied in this regard on Ext. A (marked without objection) furnished by the District Magistrate Nalanda, under the R.T.I. Act wherefrom it is explicit that ‘0’ number of votes were polled at the said polling booth as the voters of the booth had completely boycotted the election. The Presiding Officer of the booth had committed a mistake in entering Form 17-C. Similar is the case with regard to the booth no. 69. The election petitioner has admitted this fact in para 13 of the election petition that the counting result indicates that not a single poll was polled on the said polling booth(s). Ext. B corroborates the same. No vote was polled on the said booth which is a fact evident from the above. It benefited none. With regard to the illegal counting or mis-counting of votes at booth no. 69, I have carefully perused the oral evidence of PWs 7 to 11. They have in general way supported the same. The charge being vague and general in the light of the documentary evidence produced by the Returned candidate would not be accepted as proved. It is stated that at booth no. 69 the polling percentage was 100% whereas the counting result sheet also found the polling percentage 100% which was not the case. The final result sheet (Annexure-B) however, shows the total number of valid votes polled thereat inclusive of NOTA was 449. The Returned Candidate has explained in Para 22 of the written statement

that the total number of voters registered on the said booth was 977, the total number of votes polled was 449 in which the Returned Candidate obtained 122 votes whereas the other candidates including the election petitioner secured 237 votes. Ext. A also supports the same.

Similar allegation has been made by the election petitioner in paragraph no. 14 of the election petition that on booth numbers 13 (upgraded middle School Mallikpur), 18 (Primary school Amat) and 69 (Primary school Pendapur) the polling percentage was 100%. On these booths there were several dead voters. The same has been replied by the Returned Candidate in paragraph nos. 23 to 26 of the written statement. In paragraph no. 25 of the written statement of respondent no.1 (Returned Candidate) it is stated on the basis of the final result sheet (Annexure-B) that on each of the booth not more than 50% of the votes were actually polled. There is no evidence much less convicting evidence with regard to the allegation that votes were allowed to be polled of the dead voters on those booths. The allegation made in this regard and the evidence adduced in support thereof are not convincing. Ext. C has been brought on record by the Returned Candidate. On perusal whereof, it is evident that the dead voters were deleted from the voter list. RW-4 (official witness) has stated that those voters who were deleted from the voter list cannot vote. Their names had been deleted from the voter list. The other pleadings on the said charge are simply vague. In the light of above, the Court does not find any merit in the aforesaid submission of the election petitioner with regard to the miscounting or illegal counting of votes on the booths alleged by him. In course of argument no serious contention was also made on this aspect of the matter.

(15) The Court would not overlook the fact that votes polled at the election reflect the Will of the electorate in a democracy. The Court can, however, nullify the election result only when the allegation/charge of having indulged in corrupt practice by the election petitioner or his election agent are proved by convincing evidence. In the name of purity of the election it can be done but only when the charges/allegations are proved to the satisfaction of the Court. This is not the case in hand. From the foregoing, it is manifest that the election petitioner has failed to prove the said point at issue which is again answered against the election petitioner.

(16) The two crucial issues having been decided against the election petitioner results in non-suiting the election petitioner. The election petition is dismissed.

(17) No cost(s).

Sd./-

(KISHORE KUMAR MANDAL, J)

[No. 82/BR-HP/ES-1/EP/(2/2014)/2017]

By Order,

SUMIT MUKHERJEE, Secy.